Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LOT 5, FOX GROVE,
ALACHUA COUNTY, FLORIDA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT S. GRISCTI
Counsel of Record
TURNER & GRISCTI, P.A.
204 West University Avenue, Suite 6
Gainesville, Florida 32601
(904) 375-4460

DANIEL E. KATZ
1906 17th Street, N.W.
Washington, D.C. 20009
(202) 745-3829
Attorneys for Petitioner

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QUESTIONS PRESENTED

I.

Whether a Federal court can infer preemption of a State constitutional homestead right when the Federal forfeiture law at issue is ambiguous as to its intent to override State law, and the Federal law fails to satisfy the "plain statement rule" pronounced by this Court in *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991).

II.

Whether the Court of Appeals erred in this real property forfeiture case by not considering the issues of Eighth Amendment excessiveness and procedural due process after this Court's decisions in *Austin v. United States*, __ U.S. ___, 113 S.Ct. 2801, 125 L.Ed. 2d 488 (1993) and *United States v. James Daniel Good Real Property et al.*, __ U.S. __, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993).

PARTIES TO THE PROCEEDING

The Petitioner in this civil in rem forfeiture is the res, a residential property that is the subject of the action. The Respondent is the United States of America. Savanah Wims, the owner of the property, filed a claim and participated in the proceedings below as Claimant.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner and Claimant respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals (App., *infra*, 13a) is reported at 23 F.3d 359. The Orders of the Court of Appeals (App., *infra,* 14a-15a, 20a-21a) denying Petitioner's motions for leave to file supplemental briefs are not

reported. The Order of the District Court (App., *infra*, 22a-23a) is not reported.

JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals was entered on June 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall ... be deprived of life, liberty, or property, without due process of law.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

21 U.S.C. § 881(a)(7) provides:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

Article X, Section 4(a) of the Florida Constitution provides, in relevant part:

> Homestead; exemptions:
>
> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:
>
> (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be

reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family;

(2) personal property to the value of one thousand dollars.

STATEMENT OF THE CASE

1. On April 17, 1992, the United States filed a verified complaint of forfeiture in the United States District Court for the Northern District of Florida, Gainesville Division, pursuant to 21 U.S.C. § 881(a)(7). The United States sought forfeiture of the home of Savanah Wims. The District Court had jurisdiction of the civil forfeiture pursuant to 28 U.S.C. §§ 1345 and 1355.

2. On April 28, 1992, the United States Marshal's Service served the verified complaint and accompanying warrant for seizure of the property on Claimant Savanah Wims and the Petitioner property, without prior notice or hearing.

3. Savanah Wims filed a verified claim, and thereafter an answer and defenses to the complaint. Among the defenses raised, Claimant Wims asserted that Florida's homestead protection, Article X, Section 4 of the Florida Constitution, protected her home from civil forfeiture. She and her two minor children lived at the homesteaded

residence at the time of seizure. (App., *infra,* 40a-43a).

4. At a hearing held on January 5, 1993, the District Court heard argument relating to homestead protection and rejected Claimant's argument that the constitutional homestead protection afforded by Article X, Section 4 of the Florida Constitution forbids Federal civil forfeiture of the Defendant property. (App., *infra,* 22a-23a). No written order or ruling specifically addressing the homestead issue was issued by the District Court.

5. At trial, the Claimant was notified by the Government that she would be indicted for the criminal conspiracy that also served as the Government's forfeiture predicate. Under these circumstances she declined to testify and present her defense of innocent ownership, exercising her Fifth Amendment privilege against self-incrimination. The District Court, finding probable cause for forfeiture under the civil statute, entered its decree and order of forfeiture. Thereafter, the Claimant and her family were evicted from their home and Savanah Wims was indicted by the United States. She was acquitted by a jury. (App., *infra,* 44a).

6. The forfeiture was appealed by the Claimant to the United States Court of Appeals for the Eleventh Circuit. After the Initial Brief was filed in the Court of Appeals, this Court decided *Austin v. United States,* __ U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), holding that the Eighth Amendment applies in civil forfeiture cases. The Claimant moved in the Court of Appeals for supplemental briefing on the issue of Eighth Amendment excessiveness. (App., *infra,* 24a-29a). The Court of Appeals denied that motion. (App., *infra,* 21a).

7. The Court of Appeals originally affirmed the decision of the District Court *per curiam* without opinion on November 8, 1993. (App., *infra,* 18a-19a). The Claimant then moved for rehearing (App., *infra,* 36a-39a), which the Court of Appeals granted, vacating its original decision. (App., *infra,* 16a-17a). The Claimant renewed her motion for supplemental briefing on the issues of Eighth Amendment excessiveness as well as the procedural due process ramifications of *United States v. James Daniel Good v. Real Property et al.,* __ U.S. __, 114 S.Ct. 492, 126 L.Ed.2d (1993). (App., *infra,* 30a-35a). That renewed motion was denied by the Court of Appeals. (App., *infra,* 14a-15a). On June 22, 1994, the Court of Appeals affirmed with an Opinion. (App., *infra,* 1a-13a).

a. The Court of Appeals first held that this Court's decision in *Gregory v. Ashcroft,* 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), was "inapposite" to the question of whether the Federal civil forfeiture law could preempt Florida's constitutional homestead protection. (App., *infra,* 7a). In the Court of Appeal's view, the scope of *Gregory* was "far more restrictive than Claimant would have us find." (App., *infra,* 6a). The Court of Appeals explained that the Missouri constitutional provision at issue in *Gregory*, concerning the retirement age of judges, "went to the very essence of state sovereignty and political determination," and thus "the Supreme Court adopted a 'plain statement' rule: Congress must make its intention to preempt unmistakably clear in the language of the statute." (App., *infra,* 6a). The Court of Appeals stated that this Court's "plain statement preemption rule" was limited to "federal laws impacting a state's self-

identification as a sovereignty." (App., *infra,* 6a). The Court of Appeals then held that the plain statement rule would not apply in this case, because preemption of Florida's constitutional homestead provision by the Federal civil forfeiture law "would not affect Florida's sovereignty because Florida's homestead protection is a substantive policy choice, not a means of sovereign definition." (App., *infra,* 7a).

b. After disposing of the plain statement rule, the Court of Appeals held that the District Court properly inferred preemption of the Florida homestead right. (App., *infra,* 10a). The Court noted that the Florida Supreme Court had interpreted the homestead right to protect homestead property from civil or criminal forfeiture. (App., *infra,* 7a-8a). The Court of Appeals inferred that Congress intended 21 U.S.C. § 881(a)(7) to be read broadly, because the Federal civil forfeiture law makes "no allowances for property protected by state law..." (App., *infra,* 8a). Additionally, in the Court's view, legislative history evinced an intent "to extend civil forfeitures to homesteads." (App., *infra,* 9a). The Court of Appeals then held that because the Florida constitutional provision conflicted with the Federal civil forfeiture statute, 21 U.S.C. § 881(a)(7), Florida's homestead protection was preempted. (App., *infra,* 9a-10a).

REASONS FOR GRANTING THE PETITION

1. First, this case presents the important issue of Federal preemption of a fundamental State constitutional family-property right, when the Federal law is unclear as to its intent to preempt State law. The Court of Appeals' decision in this case conflicts with this Court's decision in *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), in which this Court held that Federal courts cannot infer preemption of certain fundamental State rights unless Congressional intent to do so is "clear and manifest" in the language of the Federal statute. 111 S.Ct. at 2401.

Since the early 1980's, the Federal government has greatly increased its use of civil asset forfeiture laws. Although forfeiture laws are sometimes used effectively against drug syndicates, these sweeping statutes are often used in ways that damage the interests of innocent family members. At a time when homelessness has stricken too many of our nation's children, civil asset forfeiture is removing the security of the domestic roof from innocent children. Although States have enacted constitutional homestead provisions that protect families from forfeiture of their homes, Federal courts, including the court below, have inferred preemption of these fundamental State family-property rights, despite ambiguity in the statute as to whether Congress intended to override State protections in the civil forfeiture statute, 21 U.S.C. § 881.[1] Such a holding is in

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[1]Prior to the decision below, three other Federal courts have held that Federal civil forfeiture laws preempt State constitutional homestead protection. However, none of these opinions reached the question of

conflict with this Court's decision in *Gregory v. Ashcroft*, and warrants resolution by this Court.[2]

The issue in the case *sub judice* is important because it goes to the heart of the integrity of our system of dual sovereignty. As Justice O'Connor stated in *Gregory*: "[p]erhaps the principal benefit of the Federalist system is a check on abuses of government power." *Id.* at 2399-2400. In dealing with State constitutional homestead protection, Federal courts have simply swept away State checks on abusive Federal forfeiture power, without verifying the resolve of Congress to preempt such fundamental State rights.

The Court of Appeals in this case erred in holding that the Federal civil forfeiture statute, 21 U.S.C. § 881, preempts Florida's constitutional homestead right, Article X, § 4 of the Florida Constitution. The language of the Federal civil forfeiture statute, 21 U.S.C. § 881, is ambiguous as to its intent to forfeit fundamental State family-property protection rights, and lacks a clear statement of intent to

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Gregory's impact on preemption of the homestead right. *See United States v. One Single Family Residence Located at 18755 North Bay Road, Miami*, 13 F.3d 1493, 1497 (11th Cir. 1994); *United States v. 1606 Butterfield Rd.*, 786 F. Supp. 1497, 1503-05 (N.D.Iowa 1991); *United States v. 212 Airport Rd. S.*, 771 F. Supp. 1214, 1215-16 (S.D.Fla. 1991).

[2]Circuit conflict is not present here, although Florida is one of five States that has interpreted its State constitution to protect the homestead from forfeiture. *See* note 7, *infra*.

forfeit property irrespective of State law.[3] In the decision below, the Eleventh Circuit misapplied this Court's reasoning, and thus, the decision of the Court below cannot be reconciled with this Court's ruling in *Gregory*.

In *Gregory v. Ashcroft*, several Missouri State judges filed suit in Federal court alleging that a State constitutional provision requiring all judges other than municipal court judges to retire at the age of 70 violated the Age Discrimination in Employment Act of 1967 (ADEA). *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct 2398, 115 L.Ed.2d 410 (1991). The ADEA made it unlawful for an "employer" to discharge any individual who is at least 40 years old "because of such individual's age." 111 S.Ct. at

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[3]Although 21 U.S.C. § 881 (a)(7) specifies forfeiture of standard property rights ("real property including any right, title, and interest"), the language of the statute is not "clear and manifest" as to its intent to override more significant and fundamental State rights, such as homestead protection. Furthermore, the civil forfeiture statute is especially ambiguous as to Congressional intent when read *in pari materia* with the companion criminal forfeiture statute, 21 U.S.C. § 853. The criminal forfeiture statute, § 853, expressly states that property shall be forfeited to the United States "irrespective of any provision of state law". The absence of such a provision in § 881 not only renders the statute ambiguous as to intent to override State law, but also indicates an intent on the part of Congress to respect State law. This distinction between the two statutes is especially significant because real property forfeitures under § 881 and § 853 were created by the same act of legislation. *See* Crime Control Act of 1984, Pub. L. No. 98-473, Title II, §§ 303 (creating criminal forfeiture statute) and 306 (adding provision for civil forfeiture of real property to 21 U.S.C. § 881).

2399.[4] This Court held that ADEA did not override the State constitutional provision determining the retirement age of State judges, because ADEA was ambiguous and the statute did not contain a clear statement of intention "to intrude on State governmental functions." *Id.* at 2406.[5]

Due to concerns for the integrity of the Federalist system, this Court issued the "plain statement" rule:

> Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of Federal and state powers. For this reason, "it is incumbent upon the Federal courts to be certain of Congress' intent before finding that Federal law overrides" this balance.

Id. at 2401 (*quoting Atascadero State Hospital v Scanlon*, 473 U.S. 234, 243 (1985)). This Court went on to explain:

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[4]The definition of "employer" under ADEA included "a State or political subdivision of a State." *Id.*

[5]In its reasoning, this Court emphasized our Federalist system of dual sovereignty, explaining that "[t]he States... retain substantial sovereign authority under our constitutional system." 111 S.Ct. at 2399. The *Gregory* Court also stated that the Federal government is a government of limited powers, as evidenced in the Tenth Amendment. *Id.* Despite this "delicate" balance of Federal and State power, the *Gregory* Court acknowledged that the "Federal Government holds a decided advantage" in the Supremacy Clause. *Id.* at 2400. However, the *Gregory* Court assumed that the "extraordinary power" of the Supremacy Clause is one that "Congress does not exercise lightly." *Id.* at 2400.

> Congress should make its intention 'clear and manifest' *if it intends to pre-empt the historic powers of the States*... the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

111 S.Ct. at 2401 (*quoting* Will v Michigan Dept. of State Police, 491 U.S. 58, 65 (1989)) (citations omitted)(emphasis added). This Court asserted that the Missouri constitutional provision establishing qualifications for their judges "goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity." 111 S.Ct. at 2400.

In the Eleventh Circuit's view, Florida's constitutional homestead right was not the sort of fundamental State right that required a clear statement of intent to preempt in the language of the Federal statute. (App. *infra*, 7a). We disagree.

The Court of Appeals below held that *Gregory*'s scope was "far more restrictive" than asserted by the Claimant in the case *sub judice*. (App., *infra*, 6a). According to the Eleventh Circuit, "the *Gregory* plain statement preemption rule is limited to Federal laws impacting a State's self-identification as a sovereignty."[6]

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[6]The Court of Appeals cited two cases to support its contention that the plain statement rule is limited to Federal laws impacting sovereign definition: *Reich v. New York*, 3 F.2d 581, 589-90 (2d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1187, 127 L.Ed.2d 537 (1994), and

(App., *infra* 6a). The Court below held that

> a conclusion that Florida's homestead protection provision is preempted by federal civil forfeiture law would not affect Florida's sovereignty because Florida's homestead protection is a substantive policy choice, not a means of sovereign definition.

(App., *infra*, 7a).

Such a construction by the Court of Appeals misinterprets this Court's opinion in *Gregory*. Furthermore, even if the Eleventh Circuit's characterization of the plain statement rule is accurate, preemption of Florida's homestead right does, in fact, impact Florida's self-identification as a sovereignty.

This Court's *Gregory* opinion does not simply limit the scope of the plain statement rule to laws impacting a State's "self-identification"; rather, this Court stated its concern for the overriding of State rights "of the most fundamental sort for a sovereign entity." *Gregory*, 111 S.Ct. at 2400.

The constitutional homestead right is a right of the most fundamental sort for the State of Florida. The Supreme Court of Florida has held that this family-property right prohibits the civil forfeiture of homestead property. *See*

EEOC v. Massachusetts, 987 F.2d 64, 69 (1st Cir. 1993). Neither of these cases support the contention that the plain statement rule is limited to federal laws impacting "self-identification" as a sovereign.

Butterworth v. Caggiano, 605 So. 2d 56, 61 (Fla. 1992).[7] Such homestead protection is the type of State right this Court demanded respect for in *Gregory*. The precedents of this Court indicate that preemption of Florida's constitutional homestead right by the Federal civil forfeiture law would upset the usual constitutional balance of Federal and State power. Homestead protection is not merely an area traditionally regulated by the States; this family-property right is of the most fundamental sort for a sovereign entity. Indeed, this Court has stated:

> Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements.

United States v. Yazell, 382 U.S. 341, 352 (1966). The family property right of homestead protection is a traditional and fundamental aspect of State sovereignty, as long recognized by this Court. *See Fink v. O'Neil*, 106 U.S. 272 (1882).

In *Fink v. O'Neil*, the United States sought execution upon judgment against State homestead property. *Fink*, 106

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[7]Florida is one of five States whose courts have applied State constitutional homestead protection from forfeiture. *See also State v. Means*, 877 F.2d 597 (Okla. 1994); *People v. One Residence Located at 1403 East Parham St.*, 621 N.E. 2d 1026, (Ill. App. 1993); *State v. A Tract of Land, Etc.*, 840 P.2d 453 (Kan. 1992); *In re Bly*, 456 N.W. 2d 195 (Iowa 1990). Two State courts have ruled to the contrary. *In re A Parcel of Property Known as 1632 N. Santa Rita, Tucson, Arizona*, 801 P. 2d 432 (Ariz. App. 1990); *People v. Allen*, 767 P. 2d 798 (Colo. App. 1988).

U.S. at 272. Under State law homestead property was exempt from execution. *Id.* This Court held that in the case of executions upon judgments in civil actions, the United States' remedies on judgment were limited to those provided by the State homestead law. *Id.* at 279. In so holding, Justice Matthews stated:

> [B]ased on the declared public policy of states, where the people are sovereign, laws which are acts of preservation of the home of the family, exclude the supposition of any adverse public interest, because none can be thought hostile to that. . .

Id. at 285.

The holding of the *Fink* Court was revisited eighty-four years later by this Court in *United States v Yazell*, 382 U.S. 341 (1966). In *Yazell*, the United States brought suit against a married woman in Texas to recover the balance due on a Small Business Administration disaster loan. *Id.* at 405. Under Texas coverture law at the time the loan was made, a married woman could not bind her separate property unless she first obtained a court decree removing her disability to contract. *Id.* The married woman in *Yazell* did not obtain such a decree. *Id.* The *Yazell* Court held that despite the Federal government's interest in collecting on its loans, the Texas law of coverture governed, and the Federal government was prevented from obtaining judgment against

her.[8] *Id.*

The *Yazell* Court cited *Fink* to support this holding, and referenced homestead rights as a State family-property right similar in significance to coverture. *Id.* at 355. Writing for the *Yazell* Court, Justice Fortas stated:

> [N]o contention will or can be made that the United States may by judicial fiat collect its loan with total disregard of state laws such as homestead exemptions.

Id. at 349. Justice Fortas went on to explain:

> [H]omestead exemptions vary widely. They result in a diversity of rules in the various States and in a limitation upon the power of the Federal Government to collect. . .

Id.

Florida's constitutional homestead provision has historically preserved the "domestic roof" and is "in the best interest of the family home." *Olesky v. Nicholas*, 82 So. 2d 510, 512 (Fla. 1955). This principle was reinforced in *Butterworth v. Caggiano,* 605 So. 2d 56 (Fla. 1992), in which the Supreme Court of Florida held that this family-

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[8]As the *Yazell* Court noted, the one exception to the rule that State execution procedure governs in Federal civil cases is Federal tax cases. *Yazell*, 382 U.S. 355 n.31. For example, a State homestead right could not defeat a forced sale of property under 26 U.S.C. § 7403. *See United States v Rodgers*, 461 U.S. 677, 700 (1983).

property right prohibits the forfeiture of homestead property.[9]

As described above, this Court has held that family-property homestead protection is of the most fundamental sort to the sovereignty of a State. *See United States v. Yazell*, 382 U.S. at 352; *Fink v. O'Neil*, 106 U.S. at 285. Furthermore, the homestead right is a means of sovereign definition for the State of Florida; it is through such fundamental rights for families that a State does identify and distinguish itself as a sovereignty. At the very least, Florida's constitutional homestead protection is more than a mere "substantive policy choice." Thus, the Court of Appeals erred in holding that the preemption of Florida's constitutional homestead right would not invoke the plain statement rule pronounced by this Court.

In summary, the Eleventh Circuit's interpretation of the plain statement rule is in conflict with this Court's holding in *Gregory*. This Court should settle the important question of the plain statement rule's impact on the preemption of a fundamental State family-property right.

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[9]The Supreme Court of Florida held as follows:

> [I]n light of the historical prejudice against forfeiture, the constitutional sanctity of the home, and the rules of construction requiring a liberal, nontechnical interpretation of the homestead exemption and a strict construction of the exceptions to that exemption, we hold that article X, section 4 of the Florida Constitution prohibits civil or criminal forfeiture of homestead property.

Caggiano, 605 So. 2d at 61.

Preemption of such a fundamental right of the citizens of Florida would upset the usual constitutional balance of Federal and State powers. Thus, it was necessary for the Court of Appeals below to find a clear statement of Congress' intent to preempt State family-property rights before inferring that Federal law overrides this balance.

2. The Court of Appeals also erred by not permitting the Petitioner to challenge this residential forfeiture based on this Court's recent holdings in *Austin v. United States*, __ U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993) and *United States v. James Daniel Good Real Property et al.*, __ U.S. __, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993).

Both *Austin* and *Good* were decided after the District Court entered judgment for the United States in this proceeding and while that judgment was on direct review in the Court of Appeals. The Petitioner twice sought the Court of Appeal's consideration of *Austin* and then *Good* (App., *infra,* 24a-29a and 30a-35a); the Court of Appeals declined by written Orders (App., *infra,* 21a and 14a-15a) and failed to even mention or cite *Austin* or *Good* in its written Opinion (App., *infra,* 1a-13a).

This Court's decisions in *Austin* and *Good* are applicable to this forfeiture proceeding. Both *Austin* and *Good* addressed real property forfeitures under 21 U.S.C. § 881(a)(7). *Austin,* for the first time, found the Excessive Fines Clause of the Eighth Amendment applicable to a forfeiture under that statute. An excessiveness inquiry certainly applies in the instant case, in which a residential property is at issue and in which the Claimant has been acquitted of the alleged criminal conspiracy that forms the factual predicate for forfeiture. *Good,* for the first time,

found the Due Process Clause of the Fifth Amendment to require notice and a meaningful opportunity to be heard before seizing real property under the statute, absent exigent circumstances. Again, this decision is applicable to the facts of the instant case, in which the Claimant's home, and that of her minor children, was seized by the Government without prior notice or hearing and without any pretense of exigent circumstances.

The refusal of the Court of Appeals in this case to consider the effect of *Austin* and *Good* is contrary to, and conflicts with, the basic rules of retroactive application of Supreme Court decisions announced by this Court in *Harper v. Virginia Department of Taxation,* 509 U.S. __, 113 S.Ct. __, 125 L.Ed.2d 74 (1993) (civil cases) and *Griffith v. Kentucky,* 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) (criminal cases). Those decisions eliminate limits on retroactivity by holding that all "newly declared ... rule[s]" of Federal law must be applied retroactively to all cases pending on direct review. *Harper,* 125 L.Ed.2d at 86; Griffith, 479 U.S. at 322.

Accordingly, this case should be remanded to the Court of Appeals for its consideration to the effect of *Austin* and *Good's* Eighth and Fifth Amendment rules of law on the forfeiture of Claimant Savanah Wims' home.

CONCLUSION

This Petition for a Writ of Certiorari should be granted for the two-fold purpose of preserving the "delicate balance" between Federal and State sovereignty and to insure the fundamental fairness of this residential forfeiture proceeding under the Fifth and Eighth Amendments.

DATED this 19th day of September, 1994.

Respectfully submitted,

ROBERT S. GRISCTI
Counsel of Record
TURNER & GRISCTI, P.A.
204 West University Avenue, Suite 6
Gainesville, Florida 32601
(904) 375-4460

DANIEL E. KATZ
1906 17th Street, N.W.
Washington, D.C. 20009
(202) 745-3829

Attorneys for Petitioner

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LOT 5, FOX GROVE,
ALACHUA COUNTY, FLORIDA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

ROBERT S. GRISCTI
Counsel of Record
TURNER & GRISCTI, P.A.
204 West University Avenue, Suite 6
Gainesville, Florida 32601
(904) 375-4460

DANIEL E. KATZ
1906 17th Street, N.W.
Washington, D.C. 20009
(202) 745-3829
Attorneys for Petitioner

APPENDIX A

UNITED STATES of America, Plaintiff
-Appellee, Counter-Defendant,

v.

LOT 5, FOX GROVE, ALACHUA
COUNTY, FLORIDA,
Defendant,

Savanah Wims, Claimant-Appellant,

Eng, Denman & Assoc., Inc., Claimant-
Counter-Claimant,

Manufacturers & Traders Trust Co.,
Claimant-Counter-Claimant.

No. 93-2051.

United States Court of Appeals,
Eleventh Circuit.

June 22, 1994.

Appeal from the United States District Court for the Northern District of Florida. Before COX, Circuit Judge, JOHNSON, Senior Circuit Judge, and PAINE*, Senior District Judge.

JOHNSON, Senior Circuit Judge:

*Honorable James C. Paine, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Savanah Wims ("Claimant") appeals the district court's civil forfeiture order of her residential property. Upon review, we affirm.

I. STATEMENT OF THE CASE

In April 1992, the United States filed a forfeiture complaint against Claimant's residence, described as "Lot Five, Fox Grove, Alachua County, Florida," pursuant to 21 U.S.C.A. § 881(a)(7) (West Supp.1994). The government alleged that the property was used to commit, or facilitate the commission of, federal narcotics law violations. Claimant filed a timely claim to the property. Among her defenses, she pleaded: (1) innocent ownership under § 881(a)(7) and (2) homestead protection under Article X, § 4 of the Florida Constitution.

At a pretrial conference in January 1993, the court denied Claimant's contention that the Florida homestead provision prevents federal forfeiture of the property. After jury selection, the court held a bifurcated probable cause hearing in which the government presented two witnesses, Detective James Brown of the Alachua County Sheriff's Office and Special Agent Michael Lee of the Drug Enforcement Agency.

During Detective Brown's investigation of the drug conspiracy underlying the forfeiture, he interviewed Tim Wims, one of Claimant's stepsons, concerning Claimant's role in the conspiracy. Tim Wims stated that (1) he had left $25,000 from drug sales with Claimant at the forfeited property; (2) he drew down on that amount over time; (3) Claimant knew her husband, Roosevelt Wims, and stepsons dealt drugs; and (4) he overheard conversations at the

forfeited property between Roosevelt Wims and Pablo Cruz, a drug supplier. Tim Wims also reported that Claimant had held and counted drug money that Otis Brown, another stepson, had delivered to her residence. Detective Brown confirmed this story through interviews with Otis Brown and Deon Wims, another of Claimant's stepsons.

Additionally, Detective Brown testified that Cruz told him that he sold Roosevelt Wims at least one hundred kilograms of cocaine during the course of the conspiracy and that he and Roosevelt Wims discussed drug transactions while at the property. Detective Brown further testified that Otis Brown told him that he and Roosevelt Wims had stored a truck containing two kilograms of cocaine in the forfeited property's garage before transferring the cocaine to Claimant's automobile, which was later driven to J.C. Wims, Roosevelt Wims' brother, who distributed drugs in New York.[1] Western Union records showed that J.C. Wims transferred to Claimant several large sums of money.

Shortly after beginning her case, Claimant sought and was granted a recess to speak with her counsel. Claimant then stipulated to probable cause, stating that the government told her it intended to indict her for the criminal conduct underlying the forfeiture action. Claimant therefore requested a one-day continuance, which was granted; however, the court denied Claimant's motion to dismiss the case based on the homestead provision and on the Self-Incrimination and Due Process Clauses of the Fifth Amendment to the United States Constitution. The next

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[1] Agent Lee testified that Tim Wims, Deon Wims, and Otis Brown provided him the same or similar information given in Detective Brown's testimony.

morning, Claimant moved for a stay of the forfeiture case until resolution of the expected criminal prosecution, which, along with Claimant's renewed motion to dismiss, was denied. Rather than presenting a defense, Claimant rested. As Claimant presented no evidence contradicting the government's evidence of probable cause, the court ordered the forfeiture of the residence.

II. DISCUSSION

Claimant raises two issues on appeal: (1) whether the court erred by ruling that § 881(a)(7) preempts the homestead provision of the Florida Constitution; and (2) whether the court abused its discretion by not staying the civil forfeiture trial pending resolution of the related criminal prosecution of Claimant. We review *de novo* the trial court's conclusion that the federal civil forfeiture statute preempts Florida homestead law. *United States v. 15621 S.W. 209th Ave.*, 894 F.2d 1511, 1513 (11th Cir.1990) (conclusions of law are independently reviewed). We review the trial court's decision not to stay the civil forfeiture proceeding while a related criminal matter was contemplated for an abuse of discretion. *See United States v. 566 Hendrickson Blvd.*, 986 F.2d 990, 996 (6th Cir.1993); *United States v. 6250 Ledge Rd.*, 943 F.2d 721, 729 n. 9 (7th Cir.1991); *United States v. Little Al*, 712 F.2d 133, 135 (5th Cir.1983).

A. *The Supremacy Clause*

Claimant first contends that the district court erred by concluding that federal civil forfeiture law preempts Florida's constitutional homestead right. Claimant asserts that this ruling is inconsistent with the United States Supreme

Court's decision in *Gregory v. Ashcroft,* 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) and that we must therefore reverse the court's Order of Forfeiture. We disagree.

The Supremacy Clause provides that the laws of the United States "shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. Consequently, Congress has the constitutional power to preempt state law. *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 368, 106 S.Ct. 1890, 1898, 90 L.Ed.2d 369 (1986). However, congressional authority is not unlimited. A federal statute does not supersede state law unless that is the clear and whole purpose of Congress. *Cipollone v. Liggett Group, Inc.*, --- U.S. ----, ----, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992). Congress' intent may be expressly stated in the language of the statute or implicitly contained in its structure and purpose. *Id.* "In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field" that courts can reasonably infer congressional intent to preempt the state law. *Id.* (citation omitted). *See 15621 S.W. 209th Ave.*, 894 F.2d at 1517 (noting that federal law preempts state law "if the state law and the federal law are in actual conflict so that compliance with both is physically impossible or the state law obstructs the accomplishment of the full objectives of Congress.").

Contrary to Claimant's contention that *Gregory* announces a broad, new constitutional rule, the *Gregory* Court did not generally change traditional preemption law analysis. In *Gregory,* the Supreme Court considered whether

the Age Discrimination in Employment Act ("ADEA")[2] preempted a clause of the Missouri Constitution requiring mandatory retirement of judges more than seventy years old. The Supreme Court held that the ADEA did not override the state constitutional provision because the ADEA did not contain an express statement of preemption. 501 U.S. at ----, 111 S.Ct. at 2406. The Supreme Court stressed the importance of our system of dual sovereignty, *id.* at ----, 111 S.Ct. at 2399, but concluded that the Supremacy Clause tips the balance of power toward the federal government. *Id.* at ----, 111 S.Ct. at 2400.

Gregory 's scope is far more restrictive than Claimant would have us find. Because the Missouri constitutional provision concerning the composition of the state's judicial branch went to the very essence of state sovereignty and political determination,[3] the Supreme Court adopted a "plain statement" preemption rule: Congress must make its intention to preempt unmistakably clear in the language of the statute. *Id.* at ----, 111 S.Ct. at 2401. But the *Gregory* plain statement preemption rule is limited to federal laws impacting a state's self-identification as a sovereignty. *See Reich v. New York,* 3 F.3d 581, 589-90 (2d Cir.1993) (refusing to interpret *Gregory* to resurrect undue deference

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[2] 29 U.S.C.A. §§ 621-634 (West 1985 & 1993 Supp.).

[3] "The present case concerns a state constitutional provision through which the people of Missouri establish a qualification for those who sit as their judges. This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Id.*

to State's political decisions), *cert. denied,* --- U.S. ----, 114 S.Ct. 1187, 127 L.Ed.2d 537 (1994); *EEOC v. Massachusetts,* 987 F.2d 64, 69 (1st Cir.1993) (*Gregory* made "unequivocally clear ... the narrowness of its holding"). In this case, a conclusion that Florida's homestead protection provision is preempted by federal civil forfeiture law would not affect Florida's sovereignty because Florida's homestead protection is a substantive policy choice, not a means of sovereign definition. Accordingly, *Gregory's* holding is inapposite to the case at bar, and our sole inquiry is whether the federal and state provisions conflict.

No circuit court of appeals has yet ruled whether the civil forfeiture statute preempts state homestead protection provisions. *See United States v. 1606 Butterfield Rd.,* 786 F.Supp. 1497, 1503-05 (N.D.Iowa 1991) (holding that § 881(a)(7) preempts Iowa homestead exemption); *United States v. 212 Airport Rd. S.,* 771 F.Supp. 1214, 1215-16 (S.D.Fla.1991) (holding that § 881(a)(7) preempts Florida law at issue here).

In Article X, § 4, the Florida Constitution provides that homesteads are exempt from forced sale.[4] The Florida

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[4] Article X, § 4 of the Florida Constitution provides in pertinent part:

Homestead--exemptions.

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to

Supreme Court has interpreted this provision to forbid civil or criminal forfeiture of homestead property. *See Butterworth v. Caggiano,* 605 So.2d 56, 61 (Fla.1992). For its part, § 881(a)(7) provides for forfeiture of real property,[5] and by making no allowances for property protected by state law, we infer that Congress intended § 881(a)(7) to be read broadly. Simply put, § 881(a)(7) states that all real property, without limitation or qualification, is subject to forfeiture.[6] Furthermore, Congress' rationale behind §

> the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family[.]

[5] Section 881(a)(7) of Title 21 provides:

> All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

[6] If Congress meant to say "all property" with the caveat "and we even mean real property exempt under state homestead protection law," it would have done so. *See United States v. Monsanto,* 491 U.S. 600, 606-11, 109 S.Ct. 2657, 2661-64, 105 L.Ed.2d 512 (1989) (holding that comparable language of federal criminal forfeiture statute precluded exemption of assets

881(a)(7) confirms our reading of its plain language. As set forth in legislative history, one purpose of the Comprehensive Crime Control Act of 1984, of which § 881(a)(7) is a part, was

> to enhance the use of forfeiture ... as a law enforcement tool in combatting ... drug trafficking....
>
> This bill is intended to eliminate the statutory limitations and ambiguities that have frustrated active pursuit of forfeiture by Federal law enforcement agencies.

S.Rep. No. 225, 98th Cong., 2d Sess. 191, 192, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374, 3375. Moreover, the legislative history evinces specific intent to extend civil forfeiture to homesteads. *See id.* at 195, *reprinted in* 1984 U.S.C.C.A.N. 3378 (civil forfeiture statute extends to "house" of drug offender to be "powerful deterrent" to commission of drug offense). Thus, § 881(a)(7) conflicts with Article X, s 4 of the Florida Constitution.[7] Indeed, to

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used to pay attorney because "any property" is broad and unambiguous).

[7] In discussing the "innocent owner" provision of § 881(a)(7), we borrowed Florida law on tenancies by the entirety to define the innocent owner's interests to determine that the property interests of an innocent owner spouse who owned property with her husband as tenants by the entirety could not be defeated by a forfeiture action. *15621 S.W. 209th Ave.*, 894 F.2d at 1516-18. We concluded that §§ 881(a)(7) & (h) did not preempt Florida law because "the federal law protects an innocent owner's interest, [whereas] Florida law merely defines the

carve out an exception for homestead under federal law would negate the plain meaning of § 881(a)(7) and frustrate its purpose. *Cf. United States v. Curtis*, 965 F.2d 610, 616-17 (8th Cir.1992) (holding that criminal defendant's property was subject to criminal forfeiture despite state homestead exemption). Consequently, the court properly ruled that § 881(a)(7) preempts the Florida provision, thereby permitting the forfeiture of Claimant's residential property to the United States.[8]

B. *Denial of Stay*

Claimant also contends that the district court abused its discretion by denying her request for a stay of the forfeiture proceedings on the ground that the government

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interests of owners of property." *Id.* at 1518. This case is of a different breed. *See United States v. 18755 N. Bay Rd.*, 13 F.3d 1493, 1498 n. 5 (11th Cir.1994) (distinguishing between definition of property interests and application of state homestead exemption to forfeiture action).

[8] In so holding, we do not rely upon the preemption provision contained in 21 U.S.C.A. § 903 (West 1981), because the state law at issue here does not enforce criminal drug laws. *See United States v. Stazola*, 893 F.2d 34, 38 (3d Cir.1990) (holding that "§ 903 is directed only to state laws controlling drug abuse and enforcement"). *See also Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1218 (5th Cir.1991) (finding that § 903 relates to states' regulation of drugs); *United States v. Jones*, 527 F.2d 817, 826 (D.C.Cir.1975) (after reviewing legislative history, concluding that § 903 relates to criminal drug regulation); *Luna v. Harris*, 666 F.Supp. 33, 36 (E.D.N.Y.1987) (discussing cases holding that § 903 does not preempt state criminal statutes), *aff'd*, 888 F.2d 949 (2d Cir.1989).

planned to indict her. She contends that a stay would have preserved her right to due process of law and her privilege against self-incrimination.[9] Specifically, Claimant contends that she was faced with a dilemma: remain silent and allow the forfeiture, or testify against the forfeitability of her property and expose herself to incriminating admissions that could be used in a subsequent criminal trial against her. We conclude that sufficient reasons underpinned the court's refusal to stay the civil trial.

The privilege against compulsory self-incrimination applies in civil forfeiture proceedings. *See 6250 Ledge Rd.*, 943 F.2d at 729. However, "[a] blanket assertion of the privilege is no defense to the forfeiture proceeding." *United States v. $250,000 in United States Currency*, 808 F.2d 895, 901 (1st Cir.1987) (citing *Little Al*, 712 F.2d at 135-36). *Accord 566 Hendrickson Blvd.*, 986 F.2d at 996. Similarly, a blanket assertion of the privilege is an inadequate basis for the issuance of a stay. *See 6250 Ledge Rd.*, 943 F.2d at 729. Rather, a court must stay a civil proceeding pending resolution of a related criminal prosecution only when "special circumstances" so require in the "interests of justice." *United States v. Kordel*, 397 U.S. 1, 12 & n. 27, 90 S.Ct. 763, 769-70 & n. 27, 25 L.Ed.2d 1 (1970). *See Securities & Exch. Comm'n v. Dresser Indus.*, 628 F.2d 1368, 1375 (D.C.Cir.) (en banc) (stay of civil proceedings pending outcome of criminal proceedings is not constitutionally required), *cert. denied*, 449 U.S. 993, 101 S.Ct. 529, 66 L.Ed.2d 289 (1980). The court may deny a stay so long as the privilege's invocation does not compel an

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[9] "No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law". U.S. Const., amend. V.

adverse judgment against the claimant. *United States v. Premises Located at Route 13,* 946 F.2d 749, 756 (11th Cir.1991). *See Little Al,* 712 F.2d at 136 ("The very fact of a parallel criminal proceeding, however, d[oes] not alone undercut [a claimant's] privilege against self-incrimination, even though the pendency of the criminal action forced [her] to choose between preserving [her] privilege against self-incrimination and losing the civil suit.").

Here, we find no real conflict between the forfeiture and Claimant's Fifth Amendment rights because she has not shown that her invocation of the privilege resulted in the civil forfeiture judgment against her. Once the government met its burden to show probable cause to initiate the forfeiture action, the burden then shifted to Claimant to show by a preponderance of the evidence that the property was not forfeitable. *United States v. $121,100.00 in United States Currency,* 999 F.2d 1503, 1505 (11th Cir.1993). Claimant, however, stipulated to probable cause and then rested, providing no evidence to support a defense that the forfeiture was improper. Claimant contends that without her own testimony, she could not establish her defense to the forfeiture of her property. We disagree because Claimant provided no explanation as to why she did not use the testimony of other parties to substantiate her defense. *See 566 Hendrickson Blvd.,* 986 F.2d at 996 (citing *Little Al,* 712 F.2d at 136).

Prior to stipulating to probable cause, Claimant put Roosevelt Wims on the witness stand and had plans to call other family members, several of whom were in the courtroom. In particular, Claimant had the option to examine the very persons whose hearsay statements, introduced by Detective Brown and Agent Lee, provided the

government probable cause for the forfeiture order. Thus, Claimant's assertion that only her own testimony could vindicate her is groundless; other participants to the illegal acts that gave rise to the forfeiture were available to testify at trial. Claimant's failure to indicate with precision why she did not use other parties' testimony to substantiate her defense was fatal. As a result, Claimant's basis for a stay was nothing more than a blanket assertion of the privilege against self-incrimination, which, as discussed, is an inadequate basis for a stay. *See 6250 Ledge Rd.*, 943 F.2d at 729. *Cf. Premises Located at Route 13,* 946 F.2d at 756-57 (claimant's failure to present evidence showing how invocation of privilege would result in adverse judgment requires reversal of summary judgment for claimant).[10] In sum, Claimant did not show how she would be prejudiced by the continuation of the forfeiture action while she was a target of a criminal investigation. Accordingly, the court did not abuse its discretion by denying Claimant's motion to stay the forfeiture trial.

III. CONCLUSION

We AFFIRM the district court's forfeiture order.

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[10] Claimant maintains that a "special" circumstance existed because the government advised her during the trial that it intended to indict her on drug charges. This claim is specious as the record demonstrates that Agent Lee informed Claimant's attorney that Claimant was a target in a criminal investigation weeks before the civil trial began.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-2051-1

UNITED STATES OF AMERICA,
Plaintiff-Appellee
Counter Defendant,

versus

LOT 5, FOX GROVE, ALACHUA COUNTY, FLORIDA,
Defendant,

SAVANAH WIMS,
Claimant-Appellant,

ENG, DENMAN & ASSOCIATES, INC.,
Claimant-Counter-
Claimant,

MANUFACTURERS & TRADERS TRUST CO.,
Claimant-Counter-
Claimant.

On Appeal from the United States
District Court for the
Northern District of Florida

O R D E R:

Appellant's renewed motion for leave to file a supplemental brief is denied.

/s/ E.R. COX
UNITED STATES CIRCUIT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-2051

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
Counter-Defendant-

vs.

LOT 5, FLORS [sic] GROVE,
ALACHUA COUNTY, FLORIDA,
Defendant,

SAVANAH WIMS,
Claimant-Appellant,

ENG, DENMAN & ASSOCIATES, INC.,
Claimant-Counter
Claimant,

MANUFACTURERS & TRADERS
TRUST, CO.,
Claimant-Counter
Claimant,

On Appeal from the United States District
Court for the Northern District of Florida

ON PETITION FOR REHEARING

BEFORE: FAY and BIRCH; Circuit Judges, and TUTTLE, Senior Circuit Judge

PER CURIAM:

The petition for rehearing filed by Appellant is GRANTED.

The decision and judgment of this court entered November 8, 1993, is VACATED.

The Clerk is directed to place this case on the next available oral argument calendar.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-2051

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
Counter-Defendant,

vs.

LOT 5, FOX GROVE,
ALACHUA COUNTY, FLORIDA,
Defendant,

SAVANAH WIMS,
Claimant-Appellant,

ENG, DENMAN & ASSOCIATES, INC.,
Claimant-Counter
Claimant,

MANUFACTURERS & TRADERS
TRUST, CO.,
Claimant-Counter
Claimant,

Appeal from the United States District
Court for the Northern District of Florida

(November 8, 1993)

Before FAY and BIRCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-2051

UNITED STATES OF AMERICA,

Plaintiff-
Counterclaim defendant-
Appellee,

versus

LOT 5, FOX GROVE,
ALACHUA COUNTY, FLORIDA,

Defendant,

SAVANAH WIMS,

Claimant-Appellant,

ENG, DENMAN & ASSOCIATES,
INC., ET AL,

Claimants.

On Appeal from the United States
District Court for the
Northern District of Florida

O R D E R:

Appellant's motion for leave to file supplemental brief is DENIED.

/s/ PETER T. FAY
UNITED STATES CIRCUIT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

THE UNITED STATES
OF AMERICA,

Plaintiff,

Docket No. 92-10063

vs.

Gainesville, Florida
January 5, 1993
9 A.M.

LOT 5, FOX GROVE,
ALACHUA COUNTY, FLORIDA,
WITH ALL APPURTENANCES
AND IMPROVEMENTS THEREON,

Defendant.
_____/

TRANSCRIPT OF PRETRIAL CONFERENCE BEFORE
THE HONORABLE MAURICE M. PAUL, UNITED
STATES DISTRICT JUDGE
[EXCERPTS, PP. 28-29]

APPEARANCES:

For the Plaintiff: Kenneth W. Sukhia
United States Attorney
By: ROBERT D. STINSON, ESQ.
ANTHONY J. JENKINS, ESQ.
401 SE 1st Avenue, Suite 318
Gainesville, FL 32607

For the Claimant,
Savanah Wims: Turner & Griscti
By: ROBERT S. GRISCTI, ESQ.
Post Office Box 508
Gainesville, FL 32602

Court Reporter: Judy A. Ellan, RPR
Official Court Reporter

THE COURT: Well, I don't think the Florida constitutional prohibition against alienation of homestead protects this defendant from this type of action. To allow that would allow the state of Florida to preempt the entire congressional scheme and all of the federal law, Eleventh Circuit -- I mean -- the Eleventh Circuit, I guess, and other cases make clear that no innocent owner is going to lose their interest. That's what we are going to go to trial on here. If she is an innocent owner, she's not going to be held accountable for the actions of another, unless she is accountable, you know, through her own actions here, and that's what we are going to try.

I'll enter some sort of order on this. For purposes of today, that motion is denied.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v. Case No. 93-2051

LOT 5, FOX GROVE, ALACHUA COUNTY, FLORIDA, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON,

Defendant/Appellant.
_____/

[EXCERPT OF]
APPELLANT SAVANAH WIMS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Claimant SAVANAH WIMS, by and through undersigned counsel and pursuant to 11th Cir.R. 28-4, I.O.P. -- "Supplemental Briefs," respectfully moves that the Court permit the Appellant to file a supplemental initial brief addressing a third and new issue on appeal, as grounds therefor states:

1. On June 28, 1993, the United States Supreme Court decided Austin v. United States, 61 U.S.L.W. 4811

(1993). In that decision, the United States Supreme Court held that the Eighth Amendment's Excessive Fines Clause applies to civil in rem forfeiture proceedings instituted under 21 U.S.C. §881(a)(7).

2. The instant appeal is from a Decree (R1-57) and Order (R1-63) of forfeiture of real property, including the Claimant's residence, entered by the United States District Court for the Northern District of Florida pursuant to 21 U.S.C. §881(a)(7), the same statutory forfeiture at issue in Austin v. United States, supra.

3. Claimant SAVANAH WIMS, by correspondence to the Clerk of this Court dated July 1, 1993 and pursuant to 11th Cir.R. 28-4, I.O.P. -- Citation of Supplemental Authorities, cited Austin v. United States, supra as supplemental authority in the above-referenced matter as to the two (2) issues argued in the INITIAL BRIEF OF APPELLANT; to-wit, Issue I (homestead) and Issue II (stay of proceedings).

4. The Claimant requests this Court's leave to file a supplemental initial brief as to a third issue, not argued in the INITIAL BRIEF OF APPELLANT and not raised in the trial Court; to-wit, the applicability of a substantive Eighth Amendment challenge to the instant forfeiture under the authority of Austin v. United States, supra.

5. The Claimant respectfully submits that she is entitled to raise such an Eighth Amendment challenge on appeal pursuant to that authority addressed in the memorandum of law to this MOTION.

WHEREFORE, Claimant SAVANAH WIMS requests

leave to file a supplemental brief on the applicability of the substantive Eighth Amendment ruling in Austin v. United States, supra, to the instant proceeding.

MEMORANDUM OF LAW

Although not preserved at trial, Claimant SAVANNAH WIMS should be able to assert an Eighth Amendment defense in the instant forfeiture appeal because the Claimant did not knowingly waive her right to an Eighth Amendment defense at trial. See Curtis Publishing Co. v. Butts, 388 U.S. 130, 142-146, rehearing denied, 389 U.S. 889 (1967).

Following the initiation of the instant appellate proceedings, the Supreme Court announced its decision in Austin v. United States, __ U.S. __, 61 U.S.L.W. 4811 (1993), holding that the Eighth Amendment's Excessive Fines Clause applies to civil forfeiture proceedings under 21 U.S.C. § 881(a)(7). Id. Prior to the Austin decision, this Court had held that the Eighth Amendment's Excessive Fines Clause did not apply to civil in rem forfeiture proceedings in the Eleventh Circuit. United States v. Real Property and Residence at 3097 S.W. 111th Avenue, Miami, Florida, 921 F.2d 1551, 1557 (11th Cir. 1991) (a real property residential forfeiture under 21 U.S.C. §881(a)(7)).[1]

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[1]In addition to the Eleventh Circuit, the First, Third, Fourth, Eighth and Ninth Circuits had also held that the Excessive Fines Clause of the Eighth Amendment did not apply to civil forfeiture. See United States v. One Parcel of Property, 964 F.2d 814, 818 (8th Cir. 1992), reversed, Austin v. United States, __ U.S. __, 61 U.S.L.W. 4811,

The Supreme Court has stated that "the mere failu to interpose such a defense prior to the announcement of decision which might support it cannot prevent a litiga from later invoking such ground." Curtis Publishing Co. Butts, 388 U.S. at 143. Although it is true that even constitutional objection may be waived by a failure to rai it at a proper time, "an effective waiver must ... be one a known right or privilege." Id. (citation omitted); see al Miranda v. Arizona, 384 U.S. 436, 496 n.69. (1966).

The right to raise an objection to the instant forfeitu based on the Eighth Amendment's Excessive Fines Clau was not "known" to Claimant WIMS at the time of h forfeiture trial. The Austin Opinion, decided on June 2

4817 (1993); United States v. One Parcel of Real Propert 960 F.2d 200, 207 (1st Cir. 1992); United States v. O 107.9 A Parcel of Land in Warren T.P., 898 F.2d 396, 4 (3rd Cir. 1990); United States v. Santoro, 866 F.2d 153 1544 (4th Cir. 1989); United States v. Tax Lot 1500, 8 F.2d 232, 235 (9th Cir. 1988), cert. denied 493 U.S. 9 (1990); United States v. All Tract 686.64 Acres of Propert More or Less, With All Appurtenances and Improvemen Thereon, 1993 U.S. Dist. LEXIS 5995, *20 n.4 (M.D. G 1993). Only the Second Circuit had held that the Eigh Amendment's Excessive Fines Clause applies to civ forfeiture. See United States v. Certain Real Properties a Premises (38 Whalers Cove Drive), 954 F.2d 29, 33-39 (2 Cir. 1992), cert. denied, __ U.S. __, 113 S.Ct. 55 (1992)

1993, changed the law in six Federal Circuits, including this Court's precedent. Therefore, Claimant WIMS' assertion of an Eighth Amendment defense at this time must be considered prompt and unwaived.

For these reasons, the Claimant requests this Court's permission to file a supplemental initial brief addressing the applicability of the Austin Eighth Amendment defense to the facts of this case.

Respectfully submitted,

LAW OFFICES OF TURNER & GRISCTI, PA

ROBERT S. GRISCTI
204 West University Ave., Suite 6
Post Office Box 508
Gainesville, FL 32602
904/375-4460
Florida Bar No. 300446
Counsel for Claimant SAVANAH WIMS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY copy hereof has been furnished by regular United States mail and facsimile to ROBERT STINSON, Assistant United States Attorney, 315 South Calhoun Street, #510, Tallahassee, FL 32301-1841, this 9th day of July, 1993.

/s/
ROBERT S. GRISCTI

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,
Counter-Defendant,

v. Case No. 93-2051

LOT 5, FOX GROVE, ALACHUA COUNTY, FLORIDA,
Defendant,

SAVANAH WIMS,
Claimant-Appellant,

ENG, DENMAN & ASSOCIATES, INC.,
Claimant-Counter-Claimant,

MANUFACTURERS & TRADERS TRUST CO.,
Claimant-Counter-Claimant.

_____/

RENEWED MOTION OF APPELLANT SAVANAH WIMS FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

LAW OFFICES OF TURNER & GRISCTI, PA
ROBERT S. GRISCTI
204 West University Ave., Suite 6
Post Office Box 508
Gainesville, FL 32602
904/375-4460
Florida Bar No. 300446
Counsel for Claimant-Appellant

RENEWED MOTION OF APPELLANT SAVANAH FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Claimant-Appellant SAVANAH WIMS, by and through undersigned counsel and pursuant to Rules 27, 28 and 40 of the Federal Rules of Appellate Procedure and 11th Cir. R. 27-1 and R. 28-4, respectfully moves that this Court permit the filing of a supplemental brief on rehearing, and as grounds therefor states:

1. On 28 June 1993, the United States Supreme Court decided the case of Austin v. United States, __ U.S. __, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993).

2. On 12 July 1993, the Appellant filed her MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF, requesting that this Court be granted leave to file a supplemental brief on the applicability in this proceeding of the substantive Eight Amendment ruling in Austin.

3. On 3 September 1993, this Court entered its ORDER denying the Appellant's MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF.

4. Thereafter, on 8 November 1993 this Court issued its original decision, per curiam and without opinion, affirming the DECREE and ORDER of forfeiture herein. The Appellant sought rehearing, which this Court granted on 28 December 1993 by ORDER vacating this Court's 8 November 1993 decision and judgment. Oral argument was heard on 2 February 1994.

5. On 10 February 1994 this Court decided United States v. One Single Family Residence Located at 18755 North Bay Road, Miami, 7 Fla. L. Weekly Fed. C1201 (11th Cir., Feb. 10, 1994). In that case, this Court reversed an 18 U.S.C. § 1955 civil forfeiture on Eighth Amendment grounds, noting:

> We granted the application for supplemental briefs addressing the effect of the [Austin] Court's holding that civil forfeitures are punishment, thereby implicating the Eighth Amendment prohibition against excessive fines. We may address an issue on appeal even though raised for the first time if, as here, it involves a pure legal issue and failure to consider it would result in a miscarriage of justice. Fane v. Edenfield, 945 F.2d 1514, 1519 n.11 (11th Cir. 1991), aff'd, __ U.S. _ , 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993).

7 Fla. L. Weekly Fed. at C1203.

6. In the instant case, as in Austin and United States v. One Single Family Residence Located at 18755 North Bay Road, Miami, the Government seeks forfeiture of residential property on a "facilitation" (and not a proceeds) theory of

forfeiture. The Appellant's home, purchased for over $200,000.00, exceeds in value the residential properties in those cases. Unlike those cases, the Appellant was not convicted, but rather was acquitted, of factually related criminal charges.

7. Under the same analysis employed by this Court in United States v. One Single Family Residence Located at 18755 North Bay Road, Miami the Appellant requests that she be granted leave to file a supplemental brief before this Court addressing the effect of the Eighth Amendment holding in Austin on the residential forfeiture sought by the Government herein.

8. Similarly, on 13 December 1993 the United States Supreme Court decided United States v. James Daniel Good Real Property, 62 U.S.L.W. 4013 (Dec. 13, 1993), holding that in a 21 U.S.C. §881(a)(7) real property forfeiture proceeding such as that in the instant case, the Government must provide a property owner with notice and an opportunity to be heard before seizure of the res, absent exigent circumstances establishing the need for an immediate seizure of the property. Such notice and opportunity was not provided to the Appellant prior to seizure of her home on 28 April 1992. Accordingly, the Appellant requests this Court's leave to file a supplemental brief on the effect of the Fifth Amendment holding in Good on the residential forfeiture sought by the Government herein.

WHEREFORE Appellant SAVANAH WIMS respectfully moves that this Court grant leave to file a supplemental brief.

MEMORANDUM OF LAW

The Appellant relies upon United States v. One Single Family Residence Located at 18755 North Bay Road, Miami, supra. and the authority recited by this Court in that opinion. The Appellant submits that the failure to consider the effect of Austin and Good on this case may result in a miscarriage of justice. Id. at C1203, citing Fane v. Edenfield, 945 F.2d 1514, 1519 n.11 (11th Cir. 1991), aff'd, __ U.S. __, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993).

Respectfully submitted,

LAW OFFICES OF TURNER & GRISCTI, PA

/s/

ROBERT S. GRISCTI
204 West University Ave., Suite 6
Post Office Box 508
Gainesville, FL 32602
904/375-4460
Florida Bar No. 300446
Counsel for Claimant-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY copy hereof has been furnished by regular United States mail to ROBERT STINSON, Assistant United States Attorney, 315 South Calhoun Street, #510, Tallahassee, FL 32301-1841 and JOHN D. EMMANUEL, 501 East Kennedy Boulevard, Post Office Box 1438, Tampa, Florida 33601, Gainesville, Florida 32606 this 3rd day of March, 1994.

/S/
ROBERT S. GRISCTI

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,
Counter-Defendant,

v. Case No. 93-2051

LOT 5, FOX GROVE, ALACHUA COUNTY, FLORIDA,
Defendant,

SAVANAH WIMS,
Claimant-Appellant,

ENG, DENMAN & ASSOCIATES, INC.,
Claimant-Counter-Claimant,

MANUFACTURERS & TRADERS TRUST CO.,
Claimant-Counter-Claimant.

_____/

MOTION OF CLAIMANT-APPELLANT SAVANAH WIMS FOR REHEARING

LAW OFFICES OF TURNER & GRISCTI, PA
ROBERT S. GRISCTI
204 West University Ave., Suite 6
Post Office Box 508
Gainesville, FL 32602
904/375-4460
Florida Bar No. 300446
Counsel for Claimant-Appellant

MOTION OF CLAIMANT-APPELLANT SAVANAH WIMS FOR REHEARING

Claimant-Appellant SAVANAH WIMS, by and through undersigned counsel and pursuant to Rule 40 of the Federal Rules of Appellate Procedure, respectfully moves that this Court grant rehearing in this cause and as grounds therefor states:

1. On 8 November 1993 the Court issued its decision affirming, per curiam and without written opinion, the Final Decree and Order of Forfeiture entered by the United States District Court for the Northern District of Florida.

2. In its 8 November 1993 decision, this Court cited to 11th Cir. R. 36-1, which provides that when the Court determines that any of five (5) specified circumstances exist "and an opinion would have no precedential value," a judgment or order may be affirmed without opinion.

3. The issue of law presented under Issue I of the Claimant-Appellant's INITIAL BRIEF is of first impression

in the Eleventh Circuit Court of Appeals. Specifically, neither this Court nor any other Court of Appeals has addressed by published opinion whether 21 U.S.C. §881 preempts state constitutional protection from forfeiture of homestead real property such as that provided by Article X, Section 4 of the Florida Constitution and Butterworth v. Caggiano, 605 So. 2d 56 (Fla. 1992). Only the Eighth Circuit has addressed the homestead exemption issue; it did so, however, in a criminal forfeiture proceeding under 21 U.S.C. §853(a), which specifically provides that specified properties shall be subject to forfeiture "irrespective of any provision of State law." United States v. Curtis, 965 F.2d 610 (8th Cir. 1992).

4. Thus, this Court's written opinion on the homestead exemption/preemption issue presented herein would be of precedential value by providing guidance in the disposition of similar residential homestead civil forfeiture issues under 21 U.S.C. §881(a)(7).

WHEREFORE Claimant-Appellant WIMS respectfully requests that this Court grant rehearing and that the Court issue a written opinion.

Respectfully submitted,

LAW OFFICES OF TURNER & GRISCTI, PA

/s/
ROBERT S. GRISCTI
204 West University Ave., Suite 6
Post Office Box 508
Gainesville, FL 32602
904/375-4460
Florida Bar No. 300446
Counsel for Claimant-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY copy hereof has been furnished by regular United States mail/hand delivery/facsimile to ROBERT STINSON, Assistant United States Attorney, 315 South Calhoun Street, #510, Tallahassee, FL 32301-1841 and JOHN D. EMMANUEL, 501 East Kennedy Boulevard, Post Office Box 1438, Tampa, Florida 33601, Gainesville, Florida 32606 this 23rd day of November, 1993.

/s/
ROBERT S. GRISCTI

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

THE UNITED STATES OF AMERICA,

Plaintiff,

vs. Civil Action No. 92-10063

LOT 5, FOX GROVE,
ALACHUA COUNTY, FLORIDA,
WITH ALL APPURTENANCES
AND IMPROVEMENTS THEREON,

Defendant.
_____/

[EXCERPT OF]
SAVANAH WIMS' ANSWER AND DEFENSES TO
VERIFIED COMPLAINT OF FORFEITURE AND
DEMAND FOR JURY TRIAL

SAVANAH WIMS responds to the corresponding numbered paragraphs of the VERIFIED COMPLAINT OF FORFEITURE as follows:

* * *

First Defense: Innocent Owner

9. SAVANAH WIMS is the owner of the property sought to be forfeited as demonstrated by Exhibit 1 (Warranty Deed dated 3 September 1982). She purchased this property for a total of $207,379.95, as reflected in the 3 September 1982 closing statement attached as Exhibit 2. She obtained the money for this purchase from a verdict in her favor in the case of SAVANAH WIMS, as the Personal Representative of the Estate of Roosevelt Wims, Jr., deceased, SAVANAH WIMS individually and ROOSEVELT WIMS her husband, Plaintiffs, v. BARKUS AND KRONSTADT, P.A. RICHARD A. KRONSTADT, D.O. FLORIDA OSTEOPATHIC PROFESSIONAL LIABILITY INSURANCE TRUST AND THE FLORIDA PATIENTS COMPENSATION FUND, Defendants, Case No. 80-10183 (Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida), as reflected in the attached closing statement from that case provided to her by her attorneys (Exhibit 3).

10. Any act(s) or omission(s) alleged by the UNITED STATES OF AMERICA as the basis for forfeiture in this action were committed or omitted without the knowledge or consent of the lawful owner, SAVANAH WIMS. She is an "innocent owner" pursuant to the provisions of 21 U.S.C. 881(a)(7). Accordingly, forfeiture should not be granted in this case.

Second Defense: Homestead

11. The Defendant property is the residential home of SAVANAH WIMS and her family, Ivan Wims and Hope Wims, who are her dependent minor children. SAVANAH

WIMS and her children are protected from the Government's forfeiture effort to take their home in this case under Article X, Section 4 of the Florida Constitution and the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution. Accordingly, forfeiture should not be granted in this case. In the alternative, either SAVANAH WIMS, her minor children for whom she is natural guardian, or both are entitled to just compensation for their homestead interest(s) from any judgment of forfeiture in this case.

* * *

Accordingly, SAVANAH WIMS requests that this Court dismiss this forfeiture case.

Demand for Jury Trial

SAVANAH WIMS demands a jury trial in this case on all issues so triable.

Respectfully,

/s/
SAVANAH WIMS
2626 NW 26th Place
Gainesville, FL 32605
904/371-2398

CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished by United States mail to Robert Stinson, Assistant United States Attorney, 315 South Calhoun Street, #510, Tallahassee, FL 32301-1841 this 28th day of May, 1992.

/s/
SAVANAH WIMS

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

THE UNITED STATES of AMERICA,

v. Case No. GCR: 93-01010/MMP

SAVANAH WIMS

JUDGMENT OF ACQUITTAL

The defendant was found NOT GUILTY of all charges by a jury verdict on the 22nd day of September, 1993.

It is ORDERED that the Defendant is acquitted, discharged, and any bond exonerated.

DONE and ORDERED this 24th day of September, 1993.

/s/
MAURICE M. PAUL
UNITED STATES CHIEF DISTRICT JUDGE

FILED
NOV 23 1994
OFFICE OF THE CLERK

No. 94-529

In the Supreme Court of the United States

OCTOBER TERM, 1994

LOT 5, FOX GROVE, ALACHUA COUNTY, FLORIDA,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

SEAN CONNELLY
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether real property that is used to facilitate federal drug trafficking crimes, and that is therefore subject to forfeiture under 21 U.S.C. 881(a)(7), is exempted from forfeiture by a Florida state "homestead" provision.

2. Whether petitioner defaulted any claim that forfeiture was constitutionally excessive by failing to raise it in the district court and by failing to raise it in a timely fashion on appeal.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-529

LOT 5, FOX GROVE, ALACHUA COUNTY, FLORIDA,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 23 F.3d 359.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1994. The petition for a writ of certiorari was filed on September 19, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States District Court for the Northern District of Florida found probable cause that petitioner Savanah Wims' Florida residence[1] had been used to facilitate the commission of federal drug trafficking offenses. After petitioner failed to offer any contrary evidence at trial, the court ordered the residence forfeited to the United States, pursuant to 21 U.S.C. 881(a)(7). The court of appeals affirmed. Pet. App. 1a-13a.

1. In April 1992, the United States filed a civil action seeking forfeiture of petitioner's Florida residence, pursuant to 21 U.S.C. 881(a)(7), on the ground that it had been used to facilitate the commission of federal drug trafficking offenses. Petitioner filed a claim to the property and an answer asserting the defenses that the property was exempt from federal forfeiture as a result of the Florida "homestead" provision (Fla. Const. Art. X, § 4) and that petitioner was an innocent owner. Pet. App. 2a.

In January 1993, at a pretrial conference, the district court rejected petitioner's defense that the property was immunized from federal forfeiture by the Florida homestead provision. The court then bifurcated the proceeding so that it first would determine whether the government had shown probable cause that the property was used to facilitate a drug trafficking crime and the jury then would determine whether petitioner had shown that any such crime was committed without her knowledge or consent. See 19 U.S.C. 1615 (establishing

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[1] Savanah Wims is the owner of the property that was the subject of the forfeiture proceeding below. Because she has pursued this challenge to the forfeiture of that property, she is referred to herein as "petitioner."

respective burdens), incorporated by 21 U.S.C. 881(d). Pet. App. 2a.

The government, to establish probable cause, offered testimony of Alachua County Detective James Brown and Drug Enforcement Administration Special Agent Michael Lee. The testimony indicated that petitioner had used her home to facilitate the distribution of large quantities of cocaine and the receipt of large sums of money. Pablo Cruz told Detective Brown that, during the course of the conspiracy, he had sold more than 100 kilograms of cocaine to petitioner's husband Roosevelt Wims and that he and Roosevelt Wims discussed drug transactions while at the property. Moreover, petitioner's stepsons—Tim Wims, Deon Wims, and Otis Brown—admitted to Detective Brown that they had stored drugs and drug proceeds at petitioner's home. Pet. App. 2a-3a.

The testimony at the probable cause hearing further showed that petitioner knew of, and used her home to facilitate, large-scale drug trafficking by her husband and stepsons. For example, Tim Wims admitted to the officers that he had given petitioner $25,000 in drug proceeds to hold for him at the home, and that Tim Wims drew from those funds over time. Likewise, petitioner's stepsons confirmed that petitioner had held and counted drug money for Otis Brown at the residence. Moreover, two kilograms of cocaine had been stored in petitioner's garage and later delivered in petitioner's car to J.C. Wims (petitioner's brother-in-law) in New York. Western Union records showed that J.C. Wims transferred large sums of money to petitioner. Pet. App. 2a-3a.

Following the testimony of Detective Brown and Agent Lee, petitioner stipulated that probable cause had been established. After the judge denied her motion to

stay the civil case pending an expected criminal indictment, petitioner rested without presenting a defense. Because the government's evidence of probable cause was uncontradicted, the court ordered the property forfeited to the United States. Pet. App. 3a-4a.

2. The court of appeals affirmed. Pet. App. 1a-13a. The court held that the federal forfeiture provision covering real property used to facilitate drug trafficking preempted the Florida state homestead provision. *Id.* at 4a-10a (relying on the Supremacy Clause, U.S. Const. Art. VI, Cl. 2). It explained that, while a "federal statute does not supersede state law unless that is the clear and whole purpose of Congress," congressional "intent may be expressly stated in the language of the statute or implicitly contained in its structure and purpose." Pet. App. 5a (citing *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992)). The court rejected petitioner's suggestion that "a broad, new constitutional rule" requiring a "plain statement" and "unmistakably clear" intent to preempt had been established in *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991). Pet. App. 5a-7a. Instead, the court distinguished *Gregory*, which involved the applicability of federal age discrimination requirements to state judges, as a case involving "the very essence of state sovereignty and political determination." *Id.* at 6a. In contrast, "a conclusion that Florida's homestead protection is preempted by federal civil forfeiture law would not affect Florida's sovereignty because Florida's homestead provision is a substantive policy choice, not a means of sovereign definition." *Id.* at 7a.

Turning to the specific issue of congressional intent under 21 U.S.C. 881(a)(7), the court observed that "§ 881(a)(7) states that all real property, without limitation or qualification, is subject to forfeiture." Pet. App. 8a. And, it noted, "the legislative history evinces

specific intent to extend civil forfeiture to homesteads." *Id.* at 9a (citing S. Rep. No. 225, 98th Cong., 2d Sess. 195 (1984)). The court concluded that "§ 881(a)(7) conflicts with" the Florida homestead provision because "to carve out an exception for homestead under federal law would negate the plain meaning of § 881(a)(7) and frustrate its purpose." Pet. App. 9a-10a.[2]

Petitioner did not argue at trial, in her opening brief, or in her reply brief, that the forfeiture here was an excessive penalty in violation of the Constitution. After appellate briefing was complete, however, petitioner moved for permission to file a supplemental brief raising such an argument based on *Austin* v. *United States*, 113 S. Ct. 2801 (1993), which was decided after petitioner had filed her opening brief, but before she had filed her reply brief. The court of appeals denied that motion. Pet. App. 20a-21a. It also denied a renewed motion to the same effect. *Id.* at 14a-15a. Accordingly, neither the district court nor the court of appeals reviewed petitioner's constitutional claim.

ARGUMENT

1. The court of appeals, in a decision that conflicts with no other case, correctly held that real property used to facilitate drug trafficking crimes is subject to federal forfeiture notwithstanding a state homestead provision. Under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, Congress has the unquestioned authority to preempt state laws that stand as an obstacle to achieving a legitimate federal purpose. *M'Culloch* v.

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[2] The court also held that the district court had not abused its discretion by denying petitioner's motion to stay the forfeiture trial. Pet. App. 10a-13a. Petitioner does not renew that contention here.

Maryland, 17 U.S. (4 Wheat.) 316, 417 (1819). Congress may express its preemptive intent by an explicit provision of law, or by implication. "In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field as to make reasonable the inference the Congress left no room for the states to supplement it." *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992) (citations and quotation marks omitted).

Congress has provided that "[a]ll real property" used to facilitate a federal drug trafficking crime "shall be forfeited" unless the owner establishes the crime was committed without her knowledge or consent. 21 U.S.C. 881(a)(7). The legislative history confirms that Congress viewed forfeiture of a drug offender's "house" as a "powerful deterrent" to drug crimes. S. Rep. No. 225, 98th Cong., 2d Sess. 195 (1984). State laws that purport to protect drug offenders against forfeiture of their homes conflict with the language of 21 U.S.C. 881(a)(7). Moreover, if state policies were permitted to override federal forfeiture statutes, it would remove what Congress intended as a deterrent to drug crimes. The Florida homestead provision must, therefore, give way to federal forfeiture law. *United States* v. *One Single Family Residence*, 13 F.3d 1493, 1497-1498 (11th Cir. 1994); see also *United States* v. *Curtis*, 965 F.2d 610, 616-617 (8th Cir. 1992) (property subject to criminal forfeiture notwithstanding Iowa homestead exemption); *United States* v. *One Parcel of Property*, 786 F. Supp. 1497, 1503-1505 (N.D. Iowa 1991) (property subject to civil forfeiture notwithstanding Iowa homestead exemption). Cf. *United States* v. *Rodgers*, 461 U.S. 677, 700-702 (1983) (Texas homestead provision preempted by federal tax lien statute).

Petitioner nonetheless argues (Pet. 8-18) that Congress did not express preemptive intent with the "plain statement" necessary under *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991). The issue in that case was whether the federal Age Discrimination in Employment Act of 1967 (ADEA) applied to state judges who were subject to mandatory retirement under state law. Congress had clearly intended to cover some state employees under the ADEA, but it had also exempted certain elected and appointed officials with "policymaking" responsibilities. See 501 U.S. at 464-465 (quoting 29 U.S.C. 630(f)). This Court, in considering whether Congress had preempted state laws that impose age qualifications on state judges, stressed that establishing judicial qualifications is "a decision of the most fundamental sort for a sovereign entity" because "[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." 501 U.S. at 460; see also *id.* at 463 (State's "authority * * * lies at the heart of representative government") (internal quotation marks omitted). Before it would interpret the ADEA to override that aspect of state sovereignty, the Court required a "plain statement" demonstrating preemptive intent. *Id.* at 461. It found such a plain statement lacking, because "[i]n light of the ADEA's clear exclusion of most important public officials, it is at least ambiguous whether Congress intended that appointed judges nonetheless be included." *Id.* at 470.

Petitioner's reliance on *Gregory* is misplaced, for two reasons. First, as the court of appeals explained, Missouri's judicial qualification law "went to the very essence of state sovereignty and political determination," whereas preemption of Florida's homestead provision does "not affect Florida's sovereignty because

Florida's homestead protection is a substantive policy choice, not a means of sovereign definition." Pet. App. 6a-7a. While state realty laws are essential (*BFP* v. *Resolution Trust Corp.*, 114 S. Ct. 1757, 1764-1765 (1994)), federal law "can of course override [them] by implication when the implication is unambiguous." *Id.* at 1765.[3] Second, Congress used clear and unambiguous language in making "[a]ll real property" subject to forfeiture when knowingly used by the owner to facilitate federal drug crimes (21 U.S.C. 881(a)(7)). Unlike *Gregory*, where the Court found congressional intent "ambiguous" as to the inclusion of state judges (501 U.S. at 470), there is no question that Congress intended to forfeit a drug offender's home. Cf. *United States* v. *Monsanto*, 491 U.S. 600, 609 (1989) (criminal forfeiture provision "is broad and unambiguous, and Congress' failure to supplement [21 U.S.C.] § 853(a)'s comprehensive phrase—'*any* property'—with an exclamatory 'and we even mean assets to be used to pay an attorney' does not lessen the force of the statute's plain language").

2. Petitioner also claims (Pet. 18-19) that under *Austin* v. *United States*, 113 S. Ct. 2801 (1993), forfeiture of her home was a constitutionally excessive penalty. Petitioner did not raise that claim in the district court, in her opening brief on appeal (filed after *Austin* had been argued), or in her reply brief (filed after *Austin* was decided).[4] Courts of appeals have held that arguments

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[3] In contrast, the application of federal age discrimination law to state judges in *Gregory* raised serious constitutional questions that the Court was able to avoid through its "plain statement" rule. See 501 U.S. at 467-470.

[4] Petitioner's reply brief cited *Austin* as having an "impact" upon her two properly preserved appellate claims (the preemption

raised for the first time in a reply brief are not properly preserved. See, *e.g.*, *United States* v. *Perkins*, 994 F.2d 1184, 1191 (6th Cir.), cert. denied, 114 S. Ct. 279 (1993); *United States* v. *Saunders*, 951 F.2d 1065, 1069 (9th Cir. 1991). The court of appeals here did not abuse its discretion in denying petitioner's motions, filed after her reply brief, seeking to raise a supplemental argument that had not been asserted below.

Petitioner nonetheless argues that preclusion of her belated argument contravenes "the basic rules of retroactive application of Supreme Court decisions" (Pet. 19). It is true that *Austin* applies to cases that were not yet final on direct appeal at the time of the Court's decision. Cf. *Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6, 328 (1987) (case is not final on direct appeal until certiorari is denied or the time for filing a petition for certiorari has expired). Petitioner's reliance on *Austin* fails, however, not because of any principle of retroactivity but because petitioner never timely claimed that the forfeiture was excessive or disproportionate to petitioner's wrongdoing, and the courts below never considered that issue. This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 112 S. Ct. 1735, 1738 (1992) (internal quotation marks omitted).

There is nothing about this case that would justify an exception to the Court's traditional rule against considering issues neither raised nor considered in the lower courts. Petitioner's failure to raise the claim cannot be excused by the rejection of a similar claim in a

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and stay issues), but the brief did not separately argue that the forfeiture was constitutionally excessive. See Pet. C.A. Reply Br. 12, 17.

prior Eleventh Circuit case (*United States* v. *Real Property & Residence*, 921 F.2d 1551, 1557 (1991)). There was contrary law from at least one other circuit by the time of trial (*United States* v. *Certain Real Properties & Premises*, 954 F.2d 29, 33-39 (2d Cir.), cert. denied, 113 S. Ct. 55 (1992)), and this Court had granted certiorari in *Austin* months before the filing of petitioner's appellate briefs. See 113 S. Ct. 1036 (1993). Moreover, the existence of unfavorable circuit precedent does not generally excuse failure to raise a claim properly in the lower courts. Cf. *Engle* v. *Isaac*, 456 U.S. 107, 130 (1982) ("the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial").[5] Review would be particularly inappropriate here, because petitioner's default precluded development of the record on the claim now made under *Austin*.

In any event, there is no basis for believing that the forfeiture here raises constitutional concerns. While *Austin* did not decide the specific standards that should govern proportionality review (see 113 S. Ct. at 2812 & n.15), the forfeiture here was not disproportionate, and certainly not plainly disproportionate, under any reasonable approach to that issue. For example, Justice Scalia has suggested that the sole inquiry should be "whether the confiscated property has a close enough relationship to the offense." *Austin*, 113 S. Ct. at 2815 (concurring

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[5] For similar reasons, petitioner has defaulted any claim under *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492 (1993). See Pet. 18-19. We note in any event that the rule established there—that the government generally is not entitled to ex parte seizure of real property (114 S. Ct. at 498-505)—would not avail petitioner, whose house has now been forfeited after a judicial proceeding in which she fully participated.

opinion; emphasis omitted). Here, where large quantities of illegal drugs and drug proceeds were stored in petitioner's house, the forfeiture of that house had a direct relation to the offense. And even if the proportionality inquiry required a relationship between the financial magnitude of the crime and the value of the property forfeited, the large sums of money (including $25,000 in drug proceeds held by petitioner on one occasion) and quantities of drugs (including two kilograms of cocaine on another occasion) stored at the house, not to mention the considerable scope of the overall conspiracy, sufficed to support forfeiture. Accordingly, there is no basis for initial review in this Court of petitioner's defaulted Eighth Amendment claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

SEAN CONNELLY
Attorney

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